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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. [redacted] 5

HAZEL-ATLAS GLASS COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

REPLY BRIEF FOR HAZEL-ATLAS DEFENDANTS

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November, 1943.

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HAZEL-ATLAS GLASS COMPANY, *et al.*,
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Appellee.

REPLY BRIEF FOR HAZEL-ATLAS DEFENDANTS

This reply brief is submitted to facilitate consideration of the particular questions presented by the Hazel appeal, in the light of the government brief. There are so many matters discussed in that lengthy brief that it is somewhat difficult to find what is said concerning some of the Hazel issues. And there are assertions in the government brief which seem to us unjustified and misleading.

The Hazel appeal makes the following points (Hazel brief, p. 15):

> "1. The 1932 agreement between Hazel and Hartford, and the 1935 supplement, did not violate the Sherman anti-trust law.
>
> 2. The trial court should not have taken Hazel's money 'for the dissolution of Hartford and the establishment of competing concerns'.

3. The 1932 agreement between Hazel and Owens, and the 1935 supplement, did not violate the Sherman anti-trust law.

4. There was no oral 1933 agreement, limiting fruit jar production, between Hazel, Owens, Ball Brothers and Hartford.

5. The Glass Container Association, and Hazel as a member, did not fix quotas of production, or keep newcomers out of the industry.

6. Hazel individual defendants McClure, Quay, Paull, Gee, Holloway and Seabright did not violate the anti-trust laws.

7. The injunctions were unreasonable and confiscatory."

With respect to points 3 through 7, in view of the government brief, only a few words are needed.

3. Hazel did not violate the anti-trust laws by its 1932 non-exclusive license from Owens for suction patents (Hazel brief, pp. 55-57). The government brief fails to answer the Hazel brief in this respect, nor does it anywhere attempt to support the decision below that Hazel did wrong in making this 1932 agreement.

The government brief does say (p. 319) that Owens continued to participate in the alleged conspiracy in 1935 and later, because the 1935 license which Owens granted Hazel did not license Hazel in the so-called Corning fields of ware (heat-resistant ware, etc.) and that this was illegal. But Owens was the patent owner, Hazel could not compel Owens to grant a license, and, to be practical about the

matter, Hazel never has made such ware or wanted a license to do so. Surely Hazel did not violate the anti-trust laws because Owens did not give it something Hazel did not need or want.

4. The alleged 1933 oral fruit jar agreement to restrict production is dealt with in the Hazel brief (pp. 57-60), and in the government brief (p. 151, *et seq.*, p. 290, *et seq.*). It is unnecessary to add anything.

5. The Glass Container Association activities of Hazel, one of its members, are mentioned in the Hazel brief (pp. 12, 60, 61) and the government brief discusses Association matters (p. 157 *et seq.*). The Association main and reply briefs deal with this.

6. The Hazel individual defendants, other than McNash, did not violate the anti-trust laws, even if the Hazel Company did, as pointed out in the Hazel brief (pp. 61-64). The government brief (pp. 302, 303) does not attempt to answer this, merely referring to the lower court's findings, which are fully dealt with in the Hazel brief. The suit should be dismissed as to these defendants.

7. The nature of the injunctions are sufficiently discussed in the briefs of other defendants.

The points 1 and 2 will now be considered, which are the substantial ones individual to Hazel. They relate to the 1932 cross-license agreement, which is the real reason for Hazel being included in the present suit. There is no contention, finding or evidence that Hazel ever acted

improperly with respect to patent suits or Patent Office proceedings.

I. THE REASON WHY HAZEL TOOK A HARTFORD LICENSE.

The reason why Hazel entered into a cross-license agreement with Hartford is plain—it was compelled to do so by adverse court decisions. Hazel did not want a license, because it did not need or desire the Hartford feeders or engineering service, which are used by all the other Hartford licensees, even the powerful Owens company. Hazel had its own inventors and engineers, who had been building machines for its own use since 1896, long before Hartford came into the field, and who have made many useful inventions, some of them patented. But the Hartford Company had patents which it claimed dominated the Hazel feeders. So, from 1926 to 1932 Hartford and Owens "sought to compel Hazel-Atlas to become a licensee of Hartford" (gov't. complaint, 1 R. 29), by bringing patent infringement suits against it, finally succeeding in May, 1932, when two circuit courts of appeals held that the Hazel feeders infringed the Hartford patents, *Hartford* v. *Nivison, et al.*, 6 Cir., 58 F. 2d. 701, *Hartford* v. *Hazel*, 3 Cir., 59 F. 2d. 399. Hazel had done the best it could, even getting the sixth circuit court of appeals to invalidate Hartford claims previously sustained in *Hartford* v. *Obear-Nester*, 8 Cir., 39 F. 2d. 769, and winning in the district court in the third circuit litigation. But the risk of further litigation was too great and it was plain common sense for Hazel to protect its business, by taking a license under the Hartford patents, which was lawful (Hazel brief, pp. 20-23).

II. HAZEL DID NOT RESTRAIN COMPETITION BY TAKING A HARTFORD LICENSE.

There was nothing in the Hartford licenses to Hazel which restricted competition. On the contrary, they permitted Hazel to continue its competition with the other glassware manufacturers, using its own feeders, free from Hartford patents.

A. Hazel was only a non-exclusive licensee, without control over Hartford patents and licensing policy.

Whether or not it would have been lawful for Hazel to have received from Hartford any exclusive patent rights need not be considered—Hazel received only a non-exclusive license, which is simply an agreement not to sue for patent infringement. Hartford was exactly as free after it granted the license to Hazel to license anyone, on any terms, as it was before. Hazel had no control over what Hartford did with its patents. (It would have been foolish for Hartford to allow Hazel, an independent feeder and forming machine inventor, any control, because Hazel's interests are different.)

Despite the plain provisions of the license, and the divergent interests of Hartford and Hazel with respect to the Hartford patents, the government contends that Hazel was a full "partner" of Hartford, in the sense of cooperating with it in managing its patent licensing business (and not merely a royalty sharing partner, such as in *Standard Oil* v. *U. S.*, 283 U. S. 163). The trial court so found (Hazel main brief, pp. 46-50). The government's brief here (p. 102, footnote 55; pp. 259, 260, footnotes 22 and 23) refers to the same subject.

The only evidence cited by the government to support this proposition are five letters in the first few months after the agreement was made, from the Hazel president to the Hartford president. They were entirely natural and proper letters, such as any non-exclusive licensee might write to his licensor—none evidenced the slightest control over the Hartford licensing policy. The findings of the trial court on this subject are quoted in the Hazel main brief (pp. 47-49), and the evidence relied upon there discussed—repetition here seems unncessary.

However, the government brief also says (p. 259) that Hazel "participated in Hartford's licensing policies". This goes beyond even what the trial court found, and is unsupported by the record. Such of the record citations as are pertinent show only that when in the fall of 1932 Hartford asked Hazel if it objected to proposed licenses, Hazel said it did not (Ex. 155, 19 R. 12675; Ex. 207, 19 R. 12733). In one of these cases, Hartford later granted licenses, in the other case, the Kerr Company, it did not. In both cases, Hazel had nothing to do with Hartford's decision. And it may be noted that there is no contention that Hazel had anything to do with all the other numerous license actions of Hartford after July 1932, for example, the 97 licenses granted or revised (Ex. H-5750, 27 R. 15436) and the 39 alleged Hartford refusals to license or discouragements of manufacture (gov't brief, pp. 416-420).

B. Hazel did not violate the anti-trust laws by accepting a limited license.

Hartford limited its license to Hazel to certain fields, a policy of Hartford for many years prior to 1932 (since

1916, gov't brief, p. 241). However, Hazel did obtain a license to continue doing all the things it had been doing and wanted to do, namely, to continue manufacturing and selling in the large and important fields where it had been carrying on business for many years, and inventing, making and using its own machines in its glassware manufacture. There was no reason why Hazel should have tried to get, and pay for, licenses it did not want.

The Hazel brief (p. 41) pointed out that Hazel did not agree that it would not manufacture unlicensed glassware, so that with respect to it Hazel was in the same position after the license as before, because if Hazel did manufacture such glassware, it would be subject to a suit for patent infringement and was entirely free to defend on the grounds that the patent was invalid and not infringed, as many a licensee has done. In attempted reply, the government brief (p. 172) refers to the provision in the Hartford standard license agreements, including Hazel's (12 R. 8776) that "The following articles are expressly excluded and shall not be produced *under this General License Agreement.*"* The government contends that this means that the licensee could not produce them, either under the license or not under the license, asserting (p. 173):

> "This was recognized to be an express covenant not to produce articles excluded under the license contract."

But this assertion is unsupported by any citation to the record, there was never any such recognition by Hazel, nor can we find any in the record by anyone else.

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*Italics ours throughout.

The government brief continues:

> "Hartford's counsel, W. J. Belknap, so interpreted Hartford's license as late as February 5, 1938, when he wrote an opinion to F. G. Smith to the effect that if Owens and Anchor-Hocking produced ware excluded under their respective licenses, Hartford could sue them not only for infringement but also for breach of contract (Ex. 377, R. 12945; Ex. H-5018, R. 14717-8)".

But the Owens and Hartford licenses, as appears from the letters of the Hartford lawyer, contained a provision *not* in the Hazel license, namely, "Said Leased machinery and all improvements thereon *shall be used only* for manufacturing the glassware defined as 'Permitted Ware' in Schedule 'C' annexed hereto". It was upon this provision that the Hartford lawyer relied in giving his opinion to Smith, the Hartford president, that Owens and Anchor Hocking, if they made unlicensed ware, could be sued either for breach of contract or patent infringement. (It does not appear that anyone agreed with him.)

The difference between agreeing that the manufacture of certain articles shall not be "under the license", and agreeing that licensed machines "shall be used only for" the licensed articles is obvious. It will be remembered that the Hazel feeders are owned by it, not leased from Hartford, and Hazel, since its Hartford license, has always had the right to use them as it desires, subject to the same risk of patent infringement suit by Hartford that it had before its Hartford license, if Hazel should make unlicensed use of them.

C. Hazel is not obligated to pay when it does not use Hartford patents.

The government brief (pp. 225, 264, 363) says that the Hartford-Hazel license will "discourage Hazel from making machinery inventions in the container field and licensing them to others". There is not the slightest evidence that since the contract was made in 1932 Hazel has ceased inventing and developing new machines, there was not the slightest suggestion in the court below that such was the case, the testimony shows the contrary (Carnahan, 8 R. 5611; Exs. HA-5678 and 9, 14 R. 10881 and 2), and the government does not so contend in this Court.

What the government does rely upon is a contention by Hartford, that Hazel has to pay royalties to Hartford although no Hartford patents are used, but only Hazel's own patents. Of course, if this were right, the government assertion that Hazel was a favored Hartford licensee would vanish, because other licensees pay royalties only when they use Hartford patents.

The ground for this contention is the agreement by Hazel to pay royalties for "the use of any Licensed Invention" (12 R. 8767), which means, of course, any invention for which Hazel received a license from Hartford. The government says that Hartford contends that this means Hazel's own patented inventions as well as those licensed to Hazel by Hartford, that an arbitrator so reported in a common law arbitration between Hartford and Hazel (now under review in the court below), and that if Hazel should be obligated to pay on its own patents as well as Hartford's, Hazel will be discouraged from developing and building new machines.

First, the arbitrator was mistaken. Hazel has always owned its own patents and consequently has always had the right to use them. Hartford got from Hazel only a non-exclusive license with right to sub-license, and the only patents licensed to Hazel were the Hartford patents. This matter is now in suit in the court below, as the government brief states (p. 264, footnote).

Second, if all patents were abolished, Hazel would continue developing and building new machines. Many of its inventions today are unpatented, including one that is worth $250,000 a year to Hazel (Hazel main brief, p. 32). The Hazel Company is a glassware manufacturer, whose primary interest is in making and selling glassware, and since 1896 it has followed the policy of making machines for its own use. If patenting its improvements were burdensome to it, it would stop patenting, but not improving.

Third, Hazel has acted under the license since 1932 and it has not yet been "discouraged" from machine research, development, and construction, nor has it ever paid for the use of its own patents.

D. Hartford royalties are paid by Hazel for Hartford patents, and by other licensees for Hartford feeders, engineering service, and patents.

The government brief in considering the effect of the Hartford-Hazel cross-license ignores the undisputed fact that Hazel at great expense invents, builds and maintains its own feeders. This inventive and development work is to the public interest, because it cheapens production, adds to the sum of knowledge concerning machines, stimulates inventions by others, and, can be used by others except during the term of a valid patent.

Hazel for the royalties it pays Hartford gets only a non-exclusive right to embody Hartford inventions in machines that are designed, built and serviced by Hazel. All other licensees in return for their royalties get Hartford feeders, protection against patent suits by others, and the very valuable Hartford engineering service, which costs Hartford about $1,000,000 a year (Hazel brief, p. 36). It costs Hazel much more than $250,000 a year to maintain its own engineering service (Carnahan, 8 R. 5618). That is the price Hazel has paid to be independent of Hartford feeders.

The government criticizes the Owens Company for having in 1932 "completely abandoned the use of its gob feeders" (gov't. brief, p. 58), and the trial court found that "Corning and Owens ceased all development work on feeders as a result of their 1922 and 1924 agreements, respectively, with Hartford" (finding 493, 10 R. 7375). If it were wrong for Owens and the other Hartford licensees to depend upon Hartford for their feeders and engineering service, Hazel's refusal to so depend on Hartford and insistence upon independent invention and development of new machines, at great cost to itself, should be recognized as evidencing Hazel's independence from the alleged conspiracy.

III. THE HAZEL LICENSES TO HARTFORD WERE NON-EXCLUSIVE.

Hazel retained full ownership of its own patents, with full right to grant licenses to others. Hartford received a non-exclusive license with right to sub-license others. This did not restrain competition, but, on the contrary, increased it, because Hartford obtained the right to use

Hazel patents, and others now can go to Hartford, as well as Hazel, for a license under Hazel's patents (Hazel brief, p. 26).

The government makes the extraordinary statement (brief, p. 210) that "The effect of the arrangement made in 1932 between Hartford and Hazel was to impair the power of Hazel to grant licenses under its own inventions", saying (footnote 77a) "This resulted from Hazel's ackowledgment of 'the validity and broad scope' of Hartford's patents". But how can recognition by a patent owner that another may have valid patents impair his power to grant licenses under his own patents? Of course, a prospective licensee may not be willing to pay as much for a license as if there were no other patents; but that does not in any way affect the patent owner's right and power to grant licenses under his own patents for whatever consideration anybody desiring such a license is willing to pay.

IV. HAZEL DID NOT VIOLATE THE ANTI-TRUST LAWS BY SHARING IN THE ROYALTIES COLLECTED BY HARTFORD.

The real question in this case with respect to the Hazel Company, and the real reason, we think, why Hazel was made a party defendant, is because Hazel has received large amounts of money from Hartford (naturally distasteful to Hartford and its licensees) in exchange for the Hazel patent rights, engineering "know how" and a release of an important claim. This is really what the government thinks is wrong with the Hartford-Hazel license—its other criticisms are mere makeweights.

We think it plain common sense that the grant by the owner of a patent monopoly of a license to another also to

use the invention increases—not decreases—competition, that the exchange of licenses, *i.e.*, cross-licenses, does the same, that grants by the cross-licensors of licenses to others also increases competition; and that the cross-licensors are entitled to be paid for their licenses, by a division of the royalties. And that is what this Court held in *Standard Oil* v. *U. S.*, 283 U. S. 163, where the four principal gasoline manufacturers were partners in a patent pooling arrangement, sharing in royalties paid by others, saying (p. 171):

> "An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advantage is not to be blocked by threatened litigation."

In the present case, Hazel was faced with actual, not merely threatened, litigation, including adverse decisions by two circuit courts of appeals, and the destruction of not only its technical work, but also its very business. Hartford, on its side, knew that Hazel had been inventing and operating feeders and forming machines since at least 1906, that Hazel had many patents and applications, some of which had been in Patent Office interferences with Hartford, and that a right to use not only the inventions Hazel then had but what it might get during the next thirteen years was very valuable to it and its licensees.

The government recognizes that it was lawful for Hazel to license Hartford, non-exclusively, and to be paid by a share in the royalties, *unless there was something more.* So it asserts that the purpose and effect of the payments to Hazel were

> "to make it a party to the scheme for controlling the market for unpatented glassware" (brief, 194, 259).

> "to place and maintain Hazel in a dominant position over its competitors (other than Owens) in the manufacture and sale of unpatented glassware" (*id.*, p. 262).

Neither of these contentions is sound. Hazel did not make any agreement with Hartford concerning unpatented glassware—its agreement was an ordinary, *non-exclusive* exchange of patent licenses for machines—there was no price fixing, production limiting or other possibly illegal agreement. If Hazel became a party to "the scheme" by receiving one of Hartford's limited licenses, so did every other Hartford licensee.

And the assertion that the 1932 agreement placed or maintained Hazel in a dominant position is also without foundation. In 1932 Hazel had been for many years the second largest manufacturer in the industry, and the most successful in the wide mouth ware field. But always in any industry, or human activity, some are better, and it is not criminal to succeed.

The Hazel main brief (p. 38) pointed out the lack of any "domination" by Hazel, which is unanswered in the government brief. It is true that the government asserts (brief, p. 10) "Owens and Hazel dominated[13] the glass container field[14] which consisted of approximately 38 manufacturers (Owens Ans. par. 5, R. 172)". But the Owens answer so cited does not support that assertion about Hazel in any way or even mention Hazel; the "13" footnote citations to the record are with respect to only Hartford or Owens—not Hazel; and the "14" footnote citations are to pages showing only that the Owens and Hazel shipments of glassware were greater than other concerns—nothing more.

Certainly a claim that Hazel dominated the industry is not established by the bare showing that it sells more than its competitors, excepting Owens.

And it may be observed that the government's claim of domination of the glassware industry by Hazel seems inconsistent with contentions that "Domination of the glassware industry by Owens commenced shortly after October 16, 1903" (finding 92, 10 R. 7295); that Owens dominates the entire glass industry" (finding 126, 10 R. 7304); that "Thatcher and Owens dominate the milk bottle industry" (finding 417, 10 R. 7364); that Owens is the "price leader" in the narrow neck field; and Ball Brothers is the largest manufacturer of fruit jars and the price leader in that field (gov't. complaint, 1 R. 52).

There is nothing in the record to show that the 1932 cross-license agreement restrained any trade in patents, machines or glassware. The record does show that from 1932 to 1938 the Hazel share of the business *decreased,* and that there was no decrease in the numbers of its very active competitors (GCA Exs. 6082 *et seq.,* 28 R. 16248 *et seq.*).

The record also shows that for this period Hazel did not make excessive profits (14 R. 7969 *et seq.*). The complaint charged that several defendants including Hazel had made "excessive profits" from the unlawful conspiracy (para. 188, 1 R. 54), the evidence showed that Hazel had not, the government asked the trial court to find that other defendants, but not Hazel, had made "excessive" profits, and the trial court so found with respect to other defendants (Owens, finding 128, 10 R. 7304; Thatcher, finding 419, 10 R. 7364; Hartford, finding 481, 10 R. 7374), but not as to Hazel.

The 1932 agreement has been in effect many years. There is not a scrap of evidence in the record that trade or competition were restrained by Hazel exchanging non-exclusive patent licenses with Hartford and being paid for what it sold to Hartford.

A. Hazel furnished valuable consideration to Hartford.

Hazel furnished valuable consideration to Hartford, namely, a license for Hazel's present and future patents, a right to Hazel's engineering "know-how", and a release of Hazel's claims under the Lott patents, as described in the Hazel main brief (pp. 29-36). In the court below, the government practically conceded that the Hazel considerations were valuable, by not asking the trial court to find otherwise (see the 681 findings submitted by government, 9 R. 6917, *et seq.*), while the failure of the trial court so to find, as requested by Hazel, undoubtedly was because findings favorable to defendants were not made, even when undisputed. However, the government's brief here seeks to criticize the importance of the Hazel patents and the Lott release (but not the engineering "know-how", which alone was very valuable, Hazel main brief, p. 31).

"(*a*) *There was no patent deadlock*" says the government (brief, p. 267). But it is amply shown, and not questioned, that the Hazel feeders infringed the Hartford patents so that Hazel could not use them without a Hartford license, and also that the Hazel feeders were covered by Hazel patents, so that Hartford and its licensees could not use them.

Under this same heading, the government makes a nice, but unsubstantial, distinction between using an invention

"in" as against "with" a machine, saying that some of the Hazel patents were used only "with" Hartford machines. As a practical matter, it makes no difference to the user of a Hartford machine whether the Hazel invention he needs for its efficient operation is an integral part of the machine or connected with it—the point is that he needs the Hazel invention. According to the undisputed testimony, the Hartford licensees other than Hazel have been and are using Hazel patented inventions "in" or "with" Hartford feeders and forming machines (Brown, 8 R. 6219; Ex. H-5749, 27 R. 15435), and undoubtedly also benefiting by the Hazel "know-how" and engineering experience.

During the negotiations leading up to the license, Hartford had a list of the 66 patents and 48 patent applications then owned by Hazel, including 22 patents and 11 patent applications relating to feeders, and 8 patents and 6 applications relating to forming machines (Hazel main brief, p. 30). And Hartford also obtained the right for itself and its licensees to use the future acquired patents of Hazel, during the thirteen years of the license.

The Hazel patent rights were very valuable.

"(*b*) *The claim as to Lott*" is said by the government not to have been taken by the parties "very seriously" (brief, p. 269), because it was not mentioned on a few occasions, by some one connected with Owens, Hartford or Hazel. But the contemporaneous documents from 1919 to 1930 established the existence of this claim and its serious nature, as did also the testimony of several witnesses (Hazel main brief, pp. 35, 36).

It is difficult to imagine a more serious claim. The Lott patents were infringed by the Hartford feeders, so that Hartford and its licensees could not use them without a

license under the Lott patents. Indeed, Hartford had admitted this, by consenting to a decree entered in 1924 against it that the Lott patents were valid and infringed by the Hartford feeders (Hazel Ex. 5081, 24 R. 14805). As the Lott patents did not expire until June 1938, Hartford and its licensees in 1932 were in the position, if Hartford did not have a license under Lott, of owing millions of dollars for past infringements, and, even more serious, of being enjoined until 1938.

The Hazel claim was that its 1909 contract with Owens gave Hazel exclusive rights under present and future Owens patents, in the wide mouth field (about one-third of all glass containers, finding 314, 10 R. 7345), and that Owens could not in 1924 license Hartford under the Lott patents for what Owens had previously sold Hazel.

The 1909 agreement covered both suction and so-called gob feed (Hazel main brief, p. 35). The government is mistaken in saying (brief, p. 270) "From the dates and titles of the enumerated [in the 1909 agreement] patents, it is clear that they related to suction and not to the gob feed process which was the distinctive feature of the Lott patents". We do not understand what the dates have to do with it, because the gob feed uses feeders and forming machines, both older than the suction process. Nor do the titles show that there is no patent for a gob feeding machine (1909 agreement, Ex. H-5208, 18 R. 12333). There are Bock patents listed in the agreement, it was a Bock patent "that helped to raise the issue" between Hazel and Owens, "a forming machine patent covering a machine that was not fed by suction" (Williams, 5 R. 3768), and the 1919 letter of Hazel was with respect to forming machines being within the 1909 agreement (Ex. O-5208, received 5 R.

3755 in record here, but letter not printed, Stip. 28 R. 16531).

The *negative* evidence relied upon by the government to support its contention that the Lott claim was not serious consists merely of omissions to mention it as one of the several considerations for the Hartford payments to Hazel. Smith of Hartford in writing to Falck of Corning (Ex. 140, 19 R. 12659) was considering only the "Patent Situation", and naturally did not mention releases for past infringement, either by Hazel or by Hartford (although Hazel had to pay a million dollars). Carter of Owens writing to his company (Ex. 141, 19 R. 12663) on July 18, 1932 was primarily interested in the future activities of Owens under the new licenses, and there was no reason for his telling his people that the Lott claim was serious—they knew it, as appears from Carter's March, 1930 memorandum (Ex. O-5999, 28 R. 16061, 16065) and the prior opinions of Owens counsel (Hazel main brief, p. 35). The 1932 two page letter of Hazel counsel to John W. Davis (Ex. HA-5084, 24 R. 14806) requesting advice upon the legality of the proposed agreements did not mention the Hazel release of its Lott claim, undoubtedly because such release could not restrain competition or violate the anti-trust laws. The letter of Hartford counsel (Ex. 1772, 22 R. 14258) did refer to the Hazel release of "Hartford for past infringement", saying that "For the release, the license, and engineering experience Hartford agreed to pay Hazel one-third of its net income" (p. 14263), such release including the all important Lott claim. Finally, the cross-license agreements are in general terms, releasing all claims, without specifying their nature, including even those based on decrees that Hazel had infringed Hartford patents.

The *positive* evidence of the existence of the claim and its serious nature were uncontradicted documents and testimony (Hazel main brief, p. 39). In this connection, the government brief (pp. 270, 271, footnote) comments upon Hazel not suing Owens or Hartford to establish its disputed rights in the 1909 agreement. But from 1926 to 1932 Hazel was engaged in vigorously defending itself against numerous patents, any one of which if broadly sustained would have meant that Hazel could not use its own feeders. The government says that Hazel had enough money to retain competent counsel to try the case against Owens or Hartford. But the patent litigation was already costing Hazel between $100,000 and $150,000 a year in direct expenses, and much more in the time required of its operating men and engineers, and educating new counsel in the intricacies of the tangled dealings and contracts from 1909 to 1924 would have been a long and costly process. Hazel wisely concentrated its energies upon defending itself, there being a period of several years when it was simultaneously defending suits in the sixth and the third circuit, as well as preparing to defend a suit filed in the fourth circuit (Ex. HA-5073, 24 R. 14758).

B. The amounts paid by Hazel and by Hartford.

The government's brief sets forth the amounts paid to Hazel by Hartford from 1932 through 1940 (pp. 107, 262), saying "Some idea of the extent of the competitive advantage realized by Hazel under this provision [Hazel's share in Hartford income] may be obtained from the fact that it received $10,034,000 under this provision from the date of the contract through 1940" (p. 262).

But that is very far from the complete story, and is misleading as to the real situation of Hazel, its competitors, and Hartford.

The Hartford patents cost Hazel from at least 1926 to 1932 between $100,000 and $150,000 a year, in out of pocket expenses, not including the diversion of Hazel engineers and executives from their business of making and selling glassware (McNash, 4 R. 2323). And a million dollars in cash in 1932, to settle patent claims, including the adverse decrees.

From 1932 through 1940 Hazel paid Hartford $9,335,000 (finding 222, 10 R. 7327) and in addition maintained its own engineering and servicing organization at an expense of about $250,000 a year plus the salaries of many engineers (Carnahan, 8 R. 5618).

The royalties paid by Hazel are not because Hazel uses Hartford feeders and engineering service, as do all other Hartford licensees, whom Hartford services free of extra charge. Hazel is independent of Hartford feeders and service. Nor does Hazel get the protection which Hartford gives other licensees, indemnifying them against patent infringement suits by others, by paying all the heavy expenses of defense and saving harmless the licensee with respect to royalties paid (Hazel main brief, pp. 36, 37).

To summarize, from 1926 to July 1932, the Hartford patents cost Hazel about $2,000,000, and from 1932 through 1940, the Hazel payments for Hartford patents and its own engineering have cost it at least $11,000,000, as against Hazel receipts of $10,034,000. It is plain that Hazel has not profited by the Hartford patents, and that in relation to the Hartford licensees, the only advantage Hazel has is because it is an independent inventor and developer of

machines for its own use, maintaining a costly organization for that purpose, while its competing Hartford licensees are content to rely upon Hartford.

We think it is remarkable, and a great tribute to the Hazel management that in view of the above the company made any profits. It will be remembered that there is no longer any contention that Hazel made excessive profits.

V. SOME MISCELLANEOUS MATTERS.

Essentially, the question of whether or not it was lawful for Hazel to make the 1932 cross-license agreement with Hartford depends upon whether it was right for Hazel to exchange non-exclusive licenses, accept a limited license, and share in the royalties. If this did not restrain trade or lessen competition, the agreement was lawful, otherwise not. However, the government brief mentions some minor provisions of the agreement, intended to carry out the main provisions.

(a) The license contained an acknowledgment of the validity and scope of the licensed patents (gov't. brief, pp. 104, 168). This was a standard provision in the licenses granted by Hartford, before and after the Hazel license (gov't. brief, p. 168). As the taking of a license by Hazel meant that Hazel could not dispute the validity of the licensed patents with respect to the licensed matters, this was proper, for the reasons stated in the Hazel main brief (pp. 44-46), which the government brief does not attempt to answer.

(b) The license provides that if Hartford should go into the business of manufacturing glassware, it should pay royalties for its use of licensed inventions (Sec. 7, 12

R. 8772). The government says that this tended "to discourage Hartford from the manufacture of glassware" (brief, pp. 102, 263). But it was not unfair, or illegal, to require Hartford to pay royalties for its use of inventions licensed to it. And if Hazel had licensed Hartford to use Hazel inventions without paying for them, Hartford would have had a tremendous advantage over Hazel and the rest of the industry.

(c) Hazel at the time the agreement was made, and for some years prior, had relied upon feeders and forming machines for its production, inventing and building such machines for its own use. Hazel intended to continue doing this, but Hartford could not be certain that during the thirteen years of the license Hazel might not turn to suction or some other process. As Hartford was paying Hazel not only for its then inventions and engineering "know-how" (and the Lott release), but also for its future inventions, it obviously was important to Hartford that Hazel should continue in the feeder and forming machine field.

So the license provides that if Hazel produces more than one-fifth of its glassware by non-licensed inventions, the Hartford payments to it are correspondingly decreased (Sec. 3A, 12 R. 8767). The government says (brief, pp. 103, 263) this was "To deter Hazel from using any non-licensed inventions in feeders or formers", but it was not, being for the purpose of ensuring to Hartford that it would get what it was paying for, namely, the benefit of Hazel's future work with feeders and forming machines.

(d) Although Hartford had obtained the third circuit court of appeals decision that the Peiler "stuffing" patent was valid and infringed by Hazel, it might be decided other-

wise in another case, and then this Court on certiorari might invalidate the patent. Hazel did not want to be bound by the patent in such event, especially as others, including the large Owens Company would not be bound. However, Hartford was unwilling to release Hazel to a greater extent than to agree that if the license was terminated within two years, Hazel would not be bound by the third circuit decision *until Hartford got another favorable decision in another circuit, in which case Hazel would be again under the third circuit injunction against using Hazel feeders* (supplemental license, 12 R. 8782).

Obviously, this provision did not help Hazel, because it could not afford to take the risk of not having a license under a patent adjudicated against it. Hartford would then be able to refuse a license to Hazel, thereby aiding its licensees, or enforce rigorous terms on Hazel.

About a year after the license was made, Hartford asked Hazel to extend the period for three years and Hazel agreed, because this was unimportant to Hazel—it could not terminate the license while bound by the third circuit decision. At this time Hartford was suing the Reed Company in the second circuit, on the "stuffing" patent, and did not want to run any risk of Hazel terminating its license, undoubtedly because that would mean further litigation and doubts as to what was infringing and was not. The Hazel-Hartford controversies had been settled, neither party wanted to commence again, and Hazel could not, as a practical matter.

The government brief (p. 108) says with respect to this matter that the "Parties agreed not to put validity of patents in issue". That is not so, as appears from the above statement. It may be observed that after the Hazel license,

the "stuffing" patent was sued on by Hartford in the third circuit against the Shawkee defendants, in the fifth circuit (Florida) against the Florida Glass Company, etc. (Ex. 973, 11 R. 8023; Ex. H-6100, 15 R. 11043). Hazel had nothing to do with bringing these suits or what was done with them, nor is it so contended.

The government brief (pp. 108, 109) also refers to two letters written in 1933 by Smith, Hartford's president, to Corning to the effect that unless Hazel agreed to the requested two year extension, Hartford might be forced to go to the Supreme Court which might upset the patent situation ("apple cart"), and that if the suit against Reed were unsuccessful, this "might destroy the very situation Hazel desired" (Exs. 162 and 165, 19 R. 12678, 12681). These 1933 assertions by Smith, unknown to Hazel until after the present suit was brought, were not agreed to by Hazel. Its position at the time they were made was that Hazel was under the third circuit injunction, it could not safely terminate its license, it expected to pay Hartford from $100,000 to $200,000 more than it received (McNash, 4 R. 2394; Smith, 2 R. 908), and for the period the license had been in effect Hazel had paid Hartford more than it had received (finding 227, 10 R. 7327). Of course, no one could be sure how the future payments would run, but it is plain that there was no incentive for Hazel to continue its license other than to be able to operate its feeders free of the Hartford patents.

(e) Although the complaint did not charge (paras. 111-121, 1 R. 34), the record show, or the trial court find that Hazel had anything to do with the alleged forming machine conspiracy between the Hartford and Owens companies, the government brief here in arguing that Hart-

ford and Owens did so conspire (p. 117) entitles one section "Hartford and Owens acquired O'Neill patent rights with financial assistance of Hazel" (p. 120). But this is misleading, because all that Hazel did was to pay Owens for a *non-exclusive* license to use the O'Neill suction inventions (Hazel main brief, pp. 9, 10). Hazel had a 1932 non-exclusive license to use Owens suction patents, Owens had to pay O'Neill for its suction patents, and as Hazel would automatically get the right to use them when Owens acquired them, Hazel paid something to Owens. That was all Hazel had to do with any forming machine matters, and the government does not claim there was more.

VI. THE IMPOUNDING ORDER WAS ERRONEOUS

The trial court impounded on May 9, 1941 payments by Hartford and by Hazel, under their 1932 cross-license agreement, to "insure a sufficient fund for the dissolution of Hartford and the establishment of competing concerns if that ultimately becomes necessary" (1 R. 518). There is now impounded over $4,000,000 of which about $1,900,000 are royalties paid by Hazel and the remainder payments by Hartford.

This subject is considered in the Hazel main brief (pp. 52-54), in the government brief at page 184, where it is merely mentioned, and on pages 409-412, where it is discussed.

A. If this Court finds Hazel did not violate the anti-trust laws by its 1932 Hartford agreement.

In such event, as the government brief says (p. 411), "no further step would remain but for the court to dis-

tribute the funds to their lawful owners", *i.e.*, Hazel and Hartford.

B. If this Court finds that Hazel did so violate the anti-trust laws.

In such event, the situation is more complicated.

Clearly, if this Court should affirm the decision below that the 1932 Hartford-Hazel agreement was illegal and performance under it should be enjoined, "payments under the impounding order will cease", as said in the government brief (p. 411). But there remains the question of the disposition of the impounded funds.

1. *The impounding order was illegal.*

The trial judge on motion by the government decided that the government had made a *prima facie* showing of the illegality of the agreement and of "the illegality of the payments" (1 R. 518). He did not enjoin its performance. Instead, he ordered Hazel and Hartford to continue performing the illegal contract, by making "illegal" payments in accordance with it, but to the court instead of to each other.

The reason given for enforcing the Hartford patents against Hazel, by compelling it to pay royalties for them, was "to insure a sufficient fund for the dissolution of Hartford and the establishment of competing concerns if that ultimately becomes necessary" (1 R. 518). Although the judge not only considered the contract illegal, but also the Hartford patents unenforceable, he commanded Hazel to pay for them. And this was aggravated by the fact that the third circuit decision which sustained the principal Hartford patent against Hazel, and which was the

cause of Hazel taking a license, had been obtained by a fraudulent Clarke article, according to the contention of Hazel, *Hartford* v. *Hazel,* 3 Cir., 137 F. 2d 764, certiorari petition pending, and the findings of the court below in the present case (findings 155-160, 163-165, 10 R. 7312). It was also aggravated because the royalties paid by Hazel are not for the use of Hartford feeders, engineering service and patent protection, as are all other licensees. The only reason Hazel pays is the Hartford patents, except for a very few Hartford machines, 14 of 506 (Carnahan, 8 R. 5626-7). So it was doubly unfair to take Hazel's money.

The interlocutory impounding order, made during the trial of the case from which no appeal was possible to this Court, should be declared erroneous, and the funds impounded between the date of the order, in May, 1941, and the judgment of October, 1942, should either be paid to those entitled under the contract to receive them, or, in the alternative, the royalties which the trial judge compelled Hazel to pay for the Hartford patents should be returned to Hazel.

2. *The impounded funds.*

The court below by its May 9, 1941 order declared the 1932 cross-license agreement to be *prima facie* illegal, including the payments by the parties to each other. Notwithstanding this, an order was issued, compelling the parties to continue the payments, pending final decision of the case. If the making of the payments under this contract was illegal, the order compelling Hazel and Hartford to continue to make them was manifestly in error, except on the theory that the payments into court were to be held in escrow for return to the parties making them, if the

judgment of illegality should be finally affirmed. In other words, the 1941 order could only be valid on the same basis as the October, 1942 judgment which ordered the payments continued, pending appeal. In accordance with the two orders both Hazel and Hartford have made payments under the contract, but to the clerk to be impounded, instead of to each other.

The government on this appeal seeks to distinguish between payments made before the judgment under the May 1941 order, and those made after the judgment under the October 1942 order. The government suggests that the payments made by Hazel before the judgment should be retained by the court for dissolution of Hartford, establishment of competing concerns or distribution "in accordance with equitable principles. See *United States* v. *Morgan*, 307 U. S. 183, 193-4" (gov't. brief, p. 411). As for the payments by Hazel after the judgment, the government suggests that they be "returned to Hazel on the same terms as those on which the earmarked funds are returned to the other licensees" (*id.* p. 412), namely, subject to Hartford charges for servicing, and "perhaps" for the use of Hartford machines (*id.* p. 409).

But there is no valid distinction between the payments which the court ordered Hazel to make, on the ground that some were made before the judgment and some after. In both cases, the court ordered "illegal payments" to be made under a contract held to be illegal, and Hazel paid under compulsion of the court's order. (No appeal from the interlocutory order was possible, *U. S.* v. *California Canneries*, 279 U. S. 553, 558; *Missouri-Kansas Pipe Line* v. *U. S.*, 3 Cir., 108 F. 2d 614, 615). All royalties paid by

Hazel to the court should be returned to Hazel, if the judgment of illegality is affirmed.

The effect of the government suggestion would be to partially set aside the interlocutory decision and order of the trial court. With respect to the Hazel payments, they would then be treated as legal, so that Hartford was entitled to receive them as royalties for its patents. At the same time, the government says that the Hartford payments to Hazel should not be made, because they were illegal. Obviously, if the trial court were right in deciding that the agreement was illegal, neither party should have been ordered by the court to make payments thereunder. On the other hand, if the agreement was legal, the payments should have been made in accordance therewith.

The Hazel money paid before the judgment should not be confiscated for the purpose of dissolving Hartford or for any other purpose. We do not know of any authority that in a civil suit in equity, such as the present one, money or property can be taken as a fine or punishment, or without compensation. None is cited by the government. The *Morgan* case held that certain impounded monies should not be distributed, either to the stockyard customers who had paid them to agencies for services, or to the agencies, until a rate dispute was settled. That is very far from the present case.

If Hazel has violated the antitrust laws and any private concern has been damaged thereby, there is a full and adequate remedy by a private suit for damages (one such suit is now pending). This suit should not be diverted into actions by licensees "injured by the conspiracy", as suggested by the government. Hazel money should not be taken to be used for dissolution of Hartford, establishment of competing concerns, or paying private suitors.

All royalties paid by Hazel to the court, and not only those paid after the judgment, should be returned to Hazel.

With respect to the impounded payments by Hartford, the government recognizes the inequity of Hartford and its licensees using the Hazel inventions, etc., without paying for them, by saying with respect to the period after the October, 1942 judgment "To the extent that Hazel has contributed services to Hartford, Hazel should be compensated from the funds impounded on a *quantum meruit* basis" (brief, p. 412). But as Hartford and its licensees also used the Hazel inventions, etc. during the period before the judgment, for which Hazel has not received payment, Hazel should have the same rights for that period. There is no sound distinction between the two periods.

If Hazel can not receive the payments due from Hartford for what it and its licensees got from Hazel, the latter should be permitted to enforce such rights, if any, as it may have against them for the entire period not paid for, not merely a part of such period.

CONCLUSION

Although there are many charges made against the Hazel defendants, the only serious one, it seems to us, is in connection with its 1932 Hartford agreement.

The 1932 agreement with Owens gave Hazel only a non-exclusive license to use suction machines, and Hazel has never operated under the license or had any suction patents.

Neither the alleged oral agreement in 1933 to restrict fruit jar production or the alleged conspiracy of the Glass Container Association and various members, including

Hazel, had anything to do with the alleged patent conspiracy.

The vital question on this appeal is whether Hazel, compelled in 1932 to take a patent license from Hartford, after six years of costly and perilous litigation, was wrong in taking a non-exclusive license, selling to Hartford the right to use Hazel inventions and "know-how" and a release, and receiving payment for what it sold. We think not.

Respectfully submitted,

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November, 1943.